SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1943

No. 709

IN THE MATTER OF SAM CATANZARO, JR.
Petitioner

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE THIRD CIRCUIT

REPLY
to Brief for the United States in Opposition

HAYDEN C. COVINGTON
Counsel for Petitioner

INDEX

Cases Cited

Cases Cited

Other Citations

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1943

No. 709

■

IN THE MATTER OF SAM CATANZARO, JR.
Petitioner

■

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE THIRD CIRCUIT

REPLY
to Brief for the United States in Opposition

MAY IT PLEASE THE COURT:

The Government assumes bluntly that the *Falbo* decision is a cure-all for all questions raised in Selective Service cases, because the petitioner is a "domestic rebel and outlaw" for having defied the arbitrary administrative agency. It assumes that Congress intended to deny the writ of habeas corpus and all other rights for his contempt of the illegal order.

The question presented in this case is not foreclosed by the decision of this court in *Falbo* v. *United States*, 320 U. S. —, 64 S. Ct. 346. Issues presented here are different and much broader, and cannot be avoided on slender grounds, because the rights abridged are specifically guaranteed by the Constitution.

In the *Falbo* case the narrow question presented was confined to, Whether Congress has authorized judicial review of the propriety of a board's classification in a criminal prosecution for willful violation of an order directing a registrant to report in the last step of the selective process.

"Lord Halsbury said in Quinn v. Leathem, 1901, A. C. 495, 506: 'A case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all.' " (Quoted from Cardozo, *The Nature of the Judicial Process,* Yale University Press, 1921, pp. 32-33.)

See, also, *Passenger Cases,* 7 How. 283, 470; *St. Joseph Stock Yards Co.* v. *United States,* 298 U. S. 38, 94; *Burnet* v. *Coronado Oil & Gas Co.,* 285 U. S. 393, 406.

To place upon the provision of the United States Constitution guaranteeing the writ of habeas corpus, and the statutes of Congress implementing same, a construction so as to deny the writ on the same theory that statutory defenses in a criminal case were denied in the *Falbo* decision, is to illegally and unconstitutionally suspend the writ of habeas corpus, in violation of the United States Constitution.

The chancery writ of habeas corpus is equally available to protect the liberty of the individual from arbitrary and capricious action of an administrative agency under a statute denying judicial review in the same manner, under the same circumstances, and for the same purpose, as the writ of injunction is available to protect property rights from said arbitrary and capricious action. *Wadley Sou. R. Co.* v. *Georgia,* 235 U. S. 651, 660-663; *Oklahoma Operating Co.* v. *Love,* 252 U. S. 331.

Regardless of whether the invalidity of the order can be raised in defense to an indictment, it seems plain that the

equity jurisdiction of the federal courts permits an inquiry by writ of habeas corpus to determine whether or not the order of the administrative agency upon which the indictment is based is entirely void. In the *Falbo* case the court said that the writ was available to inquire into the validity of the order *after* induction. If it is permissible to make this inquiry after induction, so as to discharge one from the custody of the military authorities under a judgment of court-martial conviction, it is also available to rescue the exempt registrant from the claws of the Department of Justice under criminal proceedings brought to enforce the administrative order. To grant the writ to the subservient person who complies with the illegal order, and at the same time to deny and suspend the writ as to one who defies the illegal order, is to discriminate and make void the provisions of the Constitution of the United States and the federal statutes guaranteeing the writ of habeas corpus, on the same ground that persons detained by the Warden of The Fleet Prison were denied the writ in the days of King Charles. It places the judgment and order of an administrative body on a higher plane than the courts of the United States. If one is found in contempt of court, the writ of habeas corpus lies to review the contempt order to ascertain whether or not the court had jurisdiction.

In this matter Catanzaro claimed that the board did not have jurisdiction and that he is not guilty of contempt of the administrative agency, for which he is being prosecuted. Therefore the cases of *In re Burrus*, 136 U. S. 586; *Ex parte Fisk*, 113 U. S. 713, 718, and *Sibbach* v. *Wilson & Co.*, 312 U. S. 1, 16, apply.

The writ lies to test *dehors* the record a judgment of conviction based on an illegal indictment or perjured testimony or an illegal confession. By force of the same reason the writ issues to test the validity of an indictment, conviction and judgment based on an illegal and unconstitutional order of an administrative agency.

The Government suggests that the cause is moot. It relies upon *Innes* v. *Crystal*, 319 U. S. 755, where there was a transfer of one in military custody pending appeal.

Innes v. *Crystal*, supra, should be reconsidered because it is an unjust and harsh extension of the principles announced in *Weber* v. *Squire*, 315 U. S. 810; *Turnello* v. *Hudspeth*, 318 U. S. 792; *Zimmerman* v. *Walker*, 319 U. S. 744, and *Ex parte Weil*, 317 U. S. 597. In those cases the appeal involving the writ of habeas corpus could be properly said to be moot, because the prisoner was released entirely from custody. To permit the transfer of a prisoner pending an appeal from one person to another to make moot the appeal is to place in the hands of the respondent a vicious instrument that leaves the judicial determination of the illegality of the restraint entirely in the discretion, whim and caprice of the prisonkeeper, as to whether he should permit judicial review by retaining custody or whether he shall deny judicial review by transferring the custody of the prisoner to some other individual and district thus keeping him on a legal "merry-go-round" or on a "hide-and-seek" adventure until he had served his time. To avoid such unjust and harsh consequences Rule 45, paragraph 1, of the Rules of this court, provides: "Pending review of the decision refusing a writ of habeas corpus the custody of the prisoner shall not be disturbed." Such a harsh rule is contrary to the liberal decisions of this court in recent years expanding the "rights of a petitioner on writ of habeas corpus". *Johnson* v. *Zerbst*, 304 U. S. 458; *Waley* v. *Johnston*, 316 U. S. 101.

And before such a technical rule restricting, denying and suspending the writ of habeas corpus be sustained, this court should fully review principles involved, allow full argument, and fully discuss the reasons back of a justification of the holding that the cause is moot because of the illegal transfer of the custody of the prisoner contrary to Rule 45, paragraph 1, of the Rules of the Supreme Court.

If, as this court has held, the petition for the writ should not be examined for technical niceties upon which to dismiss the same, it also follows that an appellate court should not scrutinize a record for technical grounds to deny relief to the prisoner illegally detained, by sending him back to another district court to run the gauntlet and begin the same action based on same grounds and run the same chance of the case's becoming again moot by another transfer of the prisoner.

The court below unanimously held that the cause was not moot and that the transfer of the prisoner from the marshal to the Attorney General of the United States, pending the appeal, did not affect the right of the petitioner for a review of the illegality of his detention.

If the opinion of the Circuit Court of Appeals, unanimous on this point, is erroneous, there should be a discussion thereof by this court; and for this reason in addition to each ground asserted in the petition the writ of certiorari should be granted in order that the law in respect to when an appeal of a writ of habeas corpus becomes moot can be fully reviewed and defined.

Conclusion

It is respectfully submitted that the petition for writ of certiorari should be granted.

HAYDEN C. COVINGTON
Counsel for Petitioner